STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 316202 Macomb Circuit Court
BRIAN DOUGLAS MONASTERSKI, Defendant-Appellant.	LC No. 2012-002767-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, as a lesser offense to an original charge of assault with intent to commit murder, MCL 750.83. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to a prison term of 7 to 20 years. We affirm.

Defendant's conviction arises from the stabbing assault of Alex Kincaide. The prosecution's theory at trial was that defendant assaulted Kincaide, his ex-roommate, because he suspected that Kincaide and Shila Martnick, his ex-girlfriend, were both involved in a robbery at defendant's house the night before. The defense did not dispute that defendant was involved in a physical altercation with Kincaide, during which Kincaide received numerous stab wounds, but argued that Kincaide initiated the confrontation and that defendant acted in self-defense.

I. JURY INSTRUCTIONS

Defendant argues that he is entitled to a new trial because the trial court erred in denying his requests for lesser offense instructions on the lesser offenses of attempted assault with intent to commit murder, attempted assault with intent to do great bodily harm less than murder, felonious assault, attempted felonious assault, aggravated assault, and attempted aggravated assault. We disagree.

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed

for an abuse of discretion. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). The determination whether an offense is a necessarily included lesser offense is a question of law that is also subject to de novo review. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

A trial court's authority to instruct the jury on lesser included offenses is governed by MCL 768.32(1), which provides:

> Except as provided in subsection (2), upon an indictment for an offense consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

There are two forms of inferior offenses: necessarily included lesser offenses and cognate lesser offenses. "A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense," while "[a] cognate lesser offense shares several of the same elements and same class or category as the greater offense but contains some elements distinct from the greater offense." *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004). A jury may be instructed on a necessarily included lesser offense but not a cognate lesser offense. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003).

"Felonious assault is a cognate lesser offense to assault with intent to commit murder." *People v Wheeler*, 480 Mich 965; 741 NW2d 521 (2007), citing *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Aggravated assault is also a cognate lesser offense of assault with intent to murder. *People v Brown*, 87 Mich App 612, 615; 274 NW2d 854 (1978). Because MCL 768.32(1) does not permit instruction on cognate lesser offenses, the trial court did not err by refusing to instruct the jury on the lesser offenses of felonious assault and aggravated assault. For the same reason, the trial court also did not err in failing to instruct the jury on an attempt to commit felonious assault or aggravated assault.

MCL 768.32(1) does permit a court to instruct on an attempt to commit a charged or necessarily included lesser offense, but an attempt instruction is warranted only if it is supported by a rational view of the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). A person is guilty of an attempt to commit a crime if the person attempts "any act towards the commission of [an offense prohibited by law], but shall fail in the perpetration[.]" MCL 750.92. Thus, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). In this case, a rational view of the evidence did not support an attempt instruction. The testimony at trial did not create any question of fact whether the victim was assaulted. The evidence clearly established that there was a physical confrontation between defendant and the victim, during which the victim was stabbed multiple times. The defense did not dispute that defendant was involved in this altercation, but rather claimed that he was

excused from criminal responsibility because he acted in self-defense. The jury was not required to resolve any factual dispute regarding whether an assault was committed, but rather was required to examine the circumstances surrounding the assault to determine whether defendant acted in self-defense. There was no rational view of the evidence that would have permitted the jury to find that defendant intended to assault the victim and performed an act toward achieving that objective, but failed to consummate an assault. Accordingly, the trial court did not err by refusing to instruct the jury on the requested attempt offenses.

II. SENTENCING

Defendant argues that the trial court erred in scoring offense variable (OV) 3 of the sentencing guidelines at 25 points. Defendant maintains that only 10 points should have been scored for OV 3, and that resentencing is required because the 15-point difference affects the appropriate guidelines range. We disagree.

In reviewing the trial court's scoring of the sentencing guidelines, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *People v Rhodes (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 310135, issued May 6, 2014), slip op at 2. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was committed. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). This Court reviews de novo whether the facts found by the trial court are adequate to satisfy the scoring conditions prescribed by the statute. *Hardy*, 494 Mich at 438; *Rhodes*, ___ Mich App ___, slip op at 2.

OV 3 considers physical injury to the victim. A 25-point score is appropriate where the victim suffers a life threatening or permanent incapacitating injury. MCL 777.33(1)(c). A 10-point score is appropriate where the victim suffers an injury requiring medical treatment, but the injury is not life threatening or permanent. MCL 777.33(1)(d). At trial, the victim, Kindcaide, testified that he was stabbed multiple times. He testified that he received "multiple puncture wounds in the back of [his] vertebrae, the back of [his] neck," and to his left ear lobe, received a few cuts to the top of his head, and was stabbed four of five times in his left shoulder, several more times on his left back, and five times on his left leg. The injuries punctured his left lung, causing it to collapse, and he had a lot of blood coming from his neck. When he was treated at the hospital, doctors had to pump blood out of his left lung. The police officer who responded to the scene testified that the victim was lying in a large pool of blood and his clothing was soaked in blood. The victim was able to speak, but his breathing was shallow and he was in and out of consciousness. The evidence regarding the nature and extent of the victim's injuries was uncontroverted. The number of stab wounds, the significant loss of blood, and particularly the puncture wound that resulted in a collapsed lung that filled with blood and needed to be pumped supports the trial court's finding that the victim suffered a life-threatening injury.

Defendant asserts that a 25-point score was not warranted because no medical evidence or testimony was presented establishing the nature and extent of the victim's injuries. However, medical testimony is not necessary to prove that a victim suffered life-threatening injuries. *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). In *McCuller*, the Court determined that a trial court's scoring of OV 3 may properly be based on uncontroverted

evidence at trial regarding the nature and extent of the victim's injuries. *Id.* at 697. The *McCuller* Court held that OV 3 was correctly scored at 25 points where the victim was struck so violently that he immediately lost consciousness, suffered a concussion, broken nose, broken cheek bone, broken eye socket, fractured skull, collapsed right inner ear wall, and required a 10-day hospital stay. *Id*. The uncontroverted evidence is this case similarly supports the trial court's 25-point score for OV 3.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood